

# What happens after the Polish Elections?

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*Professor Sadurski, in your recently appeared book "[Poland's Constitutional Breakdown](#)", you show what tremendous damage the PiS government has wrought on Polish constitutional democracy during its first term of office. In a few weeks, there will be Parliamentary elections in Poland, and Presidential elections will follow next year. The polls are not exactly promising regarding a change of government and it might very well be the case that the Law and Justice party (PiS) might tighten its grip on power. What would that mean for Poland?*

This is a terrible prospect. If I think about it myself I get deeply depressed. First of all, it is likely that Andrzej Duda will be re-elected at the Presidential election in 2020. What really matters, though, are the parliamentary elections on 13 October. Unlike Viktor Orbán in Hungary, PiS chairman Jarosław Kaczyński has not engaged in any major manipulation of the electoral system, so far. If PiS wins the elections, the prospects are bleak: They will appoint one of their own as Ombudsman, they will finish the capture of the courts and, most importantly, they will probably find some legal way to take over private media through ownership requirements. That will be pretty much the end of constitutional democracy.

*Then Poland will be in the same place as Hungary, with very little chance for a peaceful regime change?*

Most of the democratic assets which Poland, unlike Hungary, still has will be eroded, for sure. The most obvious issue is that of the Ombudsman. The incumbent, Adam Bodnar, is the last institutional pillar in Poland which still works entirely independently of PiS. But his term of office will end in mid 2020. In Poland, the Ombudsman is elected by a simple majority of the Parliament. If PiS wins, they will pick someone who will not get into their way. The same will happen with the Chief Justice of the Supreme Court. The current Chief Justice Małgorzata Gersdorf is an extremely courageous woman, but her term ends in mid 2020 as well. The PiS party has re-drafted the law about appointment in such a way that the President will be able to pick between five nominees, and it is certain that at least one of those will be pro-government. The same applies when it comes to judges of the lower rank. If the opposition loses the elections, there will probably be fewer and fewer judges who will be prepared to be as recalcitrant as many of them have been so far. Thus, the capacity and willingness for judicial independence will probably decline greatly.

But the biggest question will be about the media. PiS has never hidden their intention to "sort out the media issue" in the second term. Something that no authoritarian can put up with are vibrant, critical media. Some of the most important independent media in Poland are owned, at least partly, by German, Swiss, and American companies, and PiS has already made clear that there will be some

form of “polonization” of the media. Most probably, they will introduce cross-media ownership rules etc. and point to France as an example. They will tailor the rules in such a way that the foreign-held shares have to be bought up by Polish companies friendly to the government. And if we, the opposition, lose those independent media like *Gazeta Wyborcza*, *Newsweek Poland* and *Polityka* and the TV channel TVN, the situation will be very, very grim indeed.

*Poland still has a vibrant civil society. Will people take to the streets to defend democracy?*

If PiS wins the election, there might be some form of massive civil disobedience but the potential for that is limited. The elections will most certainly not be fair because of the massive pro-government propaganda on public television, but they may very well be free, and the electoral system has remained intact so far. The hand of the opposition will be greatly weakened. The opposition will become entrenched and PiS will be able to point to the fact that a majority of citizens have once again voted for them fully knowing what PiS is up to.

*There were some examples of successful protests in the last years, though, weren't there?*

The most powerful protests in Poland were against the Anti-Counterfeiting Trade Agreement (ACTA) which concerned the internet and gave many people the impression that their communicative life line was supposed to be controlled by the government. And second, there were the so-called black umbrella protests in all major Polish cities against the proposal to strengthen anti-abortion laws. The government immediately gave in and, very shrewdly, just dropped the proposal. These were two cases where mass protests were effective, but these protests tend to be episodic and based on a specific single issue. I doubt that the expected assault on democratic institutions would galvanize civil society enough to take to the streets and to make those policies too costly for the government to pursue them any further. The protest will take another form, however – that of emigration. I expect that there will be an increased wave of people going abroad, partly on political grounds, which would probably further contribute to people in Poland becoming apathetic and apolitical.

*What gives you hope?*

Poland is the only country in Europe with a populist government where the opposition is at least reasonably united. If you look at Italy, for example, there is Berlusconi on the one hand and *Partito Democratico* on the other with little prospect of an alliance between them. If you look at Hungary, there is the neo-fascist *Jobbik* on the one hand and socialists and liberals on the other. The situation is exactly the same in Slovakia and in the Czech Republic. Poland, from that point of view, is a positive, singular case in which there are no major ideological or structural reasons for the entire PiS opposition not to unite and to run a unified campaign against PiS despite plurality of anti-PiS parties and coalitions.

*If PiS loses the election, how should the new government undo the constitutional damage done by their predecessors? The composition of the Constitutional Court as well as of the National Council of the Judiciary and a number of other positions have been contaminated in a very dramatic way that will not automatically disappear if there is a change of government. How do you get rid of the so-called “quasi-judges”? How do you hold these persons accountable for what they did?*

In practice, this will be extremely difficult. In theory, however, this is rather simple because if I'm correct – and I provide evidence in my book – and a great number of these changes have been brought about by unconstitutional and illegal means then what it takes is to revert the situation to what it were today if the constitution had not been violated. The three “quasi judges” on the Constitutional Tribunal or their successors, for example, who have been improperly appointed – they have no legitimacy to be there. They have to go. Mrs. Przybicka, who is the chief justice of the Constitutional Tribunal, has been properly elected as a judge, but she has been improperly appointed as a chief justice, so she has to lose this position. It will be necessary to do that institution by institution, step by step, and look what would have been today's situation if the constitution had not been violated. In that sense, we will not have any fundamental problem of transitional justice but rather restoration of a constitutional state of affairs. Fortunately, these changes have not been entrenched, the constitution has not been changed, and lawyers simply have to sit down and work out the situation: “What would be? Can we imagine today as if no constitutional violations or violations of lower laws were made?”

The second point is that those who have committed obvious offences, who have violated the law, have to be held responsible by ordinary judges. I am against any special, extraordinary system because I do not think we will be in the situation of transitional justice but rather in a situation of restoration. We have to restore a properly functioning democracy. Thus, people who breached the law, for example by giving instructions – like then Prime Minister Beata Szydło – to not publish certain decisions by the Constitutional Tribunal, will have to answer for that before a court. She is alleged to have committed a criminal offence, that of abuse of the public functions, competences and powers. And independent courts will have to deal with that.

*Q: What about the judgments that those improperly appointed judges have already participated in?*

What I described is a blueprint which, of course, sounds much simpler than it will be in reality. The fact that many of those judges have participated in judgments does not mean that all these judgments will have to be held invalid. Of course, it is extremely difficult to bring about the *status quo ante*. But I think this is the template we will have to use, and a great number of the finest Polish lawyers, in particular constitutional lawyers, are now involved in various projects and writing reports and working rules about how to restore the rule of law. The question is: “What to do the day after the election?” I think this has to be done, this question has to be worked on now. But sometimes I fear that this work of imagining the day PiS will be out of power has mostly therapeutic value for those who do it. I think it is a little bit of that. I guess that's psychologically understandable.

